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APR 25 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 02-90297

Baita Real Estate, Inc.,

CHAPTER 7

Debtor.

JUDGE MASSEY

Martha A. Miller, in her official capacity as
Chapter 7 Trustee for the Bankruptcy :
Estate of Baita Real Estate, Inc.; Ricco
Gartmann; Marco Moro; Gerard Staubli ;
Yvette Staubli; Franz-Xaver Muheim and
Kleinert Investment, AG,

Plaintiffs,

v.

ADVERSARY NO. 04-6678

Peter S. Bratschi and Baita International, LLC,

Defendants.

ORDER

In this adversary proceeding, Plaintiffs move to join Reto Schneider as a defendant (document no. 12) and to drop Gerard Staubli, Yvette Staubli and Franz-Xaver Muheim as Plaintiffs (document no. 21). Defendant moves to dismiss this adversary proceeding pursuant to Bankruptcy Rules 7012 and 7015 (document no. 23). The Court held a hearing on the motions on April 22, 2005.

Martha Miller, who serves as counsel to herself as Plaintiff and as Trustee of the estate of Baita Real Estate, Inc., the Debtor, announced at the hearing that she has been informed that Reto Schneider has filed bankruptcy. Hence, that motion is stayed but for the sake of keeping up with pending motions is also DENIED without prejudice.

Defendants do not oppose the motion to drop three individuals as Plaintiffs, and that motion is granted.

Defendant Bratschi's motion to dismiss is based in part on Plaintiffs' filing of three amended complaints, followed by withdrawals of the first two amendments. Each document withdrawing an amended complaint specifically referred to the amendment being withdrawn. There was no indication in the withdrawals or otherwise that Plaintiffs intended to withdraw the original complaint. The first filing of an amended complaint on January 25, 2005, triggered Civil Rule 15(a), made applicable by Bankruptcy Rule 7015, which provides in relevant part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Withdrawal of the amendment did not reinstate Rule 15(a)'s license for one free amendment without court approval. Lack of prejudice to the Defendants is irrelevant to the question of whether court approval is required for a second amendment. Were it otherwise, a plaintiff could circumvent Rule 15(a) at will by withdrawing one amendment after another, followed by subsequent amendments.

Plaintiff contends that because the second amended complaint stated on page 1 that it replaces the original complaint in its entirety, the withdrawal of the second amendment left the record bare of any complaint. This argument fails because Plaintiffs lacked authority to file the second (and third) amendment without court approval. Even if Defendant were correct, the withdrawal document itself was conditioned on the filing, for the third time, of an amended complaint. Plainly the final amendment was intended to relate back to the date of the filing of the original complaint. Defendant's motion thus seeks to elevate form over substance with no showing that Defendant had suffered any harm.

There is an alternative way of looking at what happened here. It is that the first amendment to the complaint was effective to amend the complaint. The attempt to withdraw that amendment was, therefore, in effect a motion to further amend the complaint. There is support for this idea.

This new [amended complaint] superseded the Original Complaint for Damages and became the operative statement of plaintiffs' state law claims before this court. *See, e.g., 188 LLC v. Trinity Industries, Inc.*, 300 F.3d 730, 736 (7th Cir.2002) ("An amended pleading ordinarily supersedes the prior pleading. The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading and becomes *functus officio*. *Nisbet v. Van Tuyl*, 224 F.2d 66, 71 (7th Cir.1955)."); *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir.2001) ("As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect." (internal quotation marks omitted)); *Armstrong v. Davis*, 275 F.3d 849, 878 n. 40 (9th Cir.2001) ("'[A]n amended pleading supersedes the original.' *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir.1989) (citations omitted)"); *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 162 (2d Cir.2000) (as a general rule, "an amended pleading ordinarily supersedes the original and renders it of no legal effect."); *In re Atlas Van Lines*, 209 F.3d 1064 (8th Cir.2000) (It is well-established that an amended complaint supercedes an original complaint and renders the original complaint without legal effect." (citing *Washer v. Bullitt County*, 110 U.S. 558, 562, 4 S.Ct. 249, 28 L.Ed. 249 (1884))); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1476 (2d ed. 1990) ("A pleading that has been amended ... supersedes the pleading it modifies.... Once an amended pleading is

interposed, the original pleading no longer performs any function in the case...."); 3 J. Moore & J. Lucas, Moore's Federal Practice ¶ 15.08[7] (2d ed. 1988) ("An amended pleading that is complete in itself and neither refers to nor adopts any portion of the prior pleading supersedes the latter.").

New Mexico v. General Elec. Co., 335 F. Supp.2d 1157, 1164 (D. N.M. 2003).

Looking at the problem this way, the presently effective complaint is the first amended complaint, and the withdrawal of that complaint is merely an undecided motion to amend the complaint further. Under this construction, the Court GRANTS the motion to withdraw the first amended complaint, and the second and third amended complaints are nullities.

For these reasons, the portion of Defendant Bratschi's motion to dismiss based on amendments to the complaint and the withdrawal of those amendments is DENIED. The balance of the motion will be considered if and when Defendant schedules a new hearing on the motion, with or without amendments to it, after May 6, 2005. If Defendant decides not to prosecute this motion, he should withdraw it. If he answers and does not within thirty days thereafter schedule a hearing on the motion to dismiss under Rule 12, the balance of the motion will be deemed withdrawn without prejudice.

Plaintiffs shall have to and through May 6, 2005 within which to file a motion to amend the complaint, which is the one filed on December 29, 2004.

IT IS SO ORDERED.

Dated: April 22, 2005.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE